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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION

This Document Relates to:

All Indirect Purchaser Actions

Sharp Electronics Corp., et a. v. Hitachi Ltd., et al., No. 13-cv-1173;

Sharp Elecs. Corp. v. Koninklijke Philips Elecs. N.V., No. 13-cv-02776;

Siegel v. Hitachi, Ltd., No. 11-cv-05502;

Siegel v. Technicolor SA, et al., No. 13-cv-05261;

CASE NO.: 3:07-CV-05944-SC

MDL NO.: 1917

DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE IMPROPER CHARACTERIZATIONS OF OR REFERENCES TO DEFENDANTS AND ALLEGED CO-CONSPIRATORS

[DEFENDANTS' MIL NO. 6]

ORAL ARGUMENT REQUESTED

Date: TBD
Time: TBD
Place: Courtroom 1, 17th Floor
Hon. Samuel Conti

Best Buy Co., et al. v. Hitachi, Ltd., et al., No. 11-cv-05513;

Best Buy Co., et al. v. Technicolor SA, et al., No. 13-cv-05264;

Target Corp. v. Chunghwa Picture Tubes, Ltd., et al., No. 11-cv-05514;

Target Corp. v. Technicolor SA, et al., No. 13-cv-05686;

Sears, Roebuck and Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd., No. 11-cv-05514;

Sears, Roebuck and Co. and Kmart Corp. v. Technicolor SA, No. 13-cv-05262;

Viewsonic Corp. v. Chunghwa Picture Tubes, Ltd. No. 14-cv-02510.

REDACTED VERSION OF DOCUMENT SUBMITTED UNDER SEAL

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on a date and time to be set by the United States District Court for the Northern District of California, San Francisco Division, before the Honorable Samuel Conti, the undersigned Defendants will and hereby do move the Court for an order excluding the following improper characterizations of or references to Defendants and their alleged co-conspirators: (1) use of inflammatory rhetoric to refer to Defendants and/or their alleged co-conspirators; (2) stereotyping of Asian firms and Asian business culture; and (3) referring to Defendants and/or their alleged co-conspirators by generic references to corporate entities that do not legally exist, which improperly groups together multiple, separate entities.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the declaration of James L. McGinnis submitted concurrently herewith, the pleadings and correspondence on file with the Court, and such arguments and authorities as may be presented at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the Court should prohibit Plaintiffs' and their witnesses' use of inflammatory rhetoric at trial, including, but not limited to referring to Defendants and/or their alleged co-conspirators as "convicted criminals," "felons," "admitted price-fixers," or "cartelists."

2. Whether the Court should prohibit Plaintiffs and their witnesses from appealing to negative stereotypes of Asian companies and Asian business culture.

3. Whether the Court should compel Plaintiffs and their witnesses to refer to Defendants and/or their alleged co-conspirators by their specific corporate entity names (e.g., "Hitachi America" and "Hitachi Asia") in lieu of generic references to corporate entities which do not legally exist and improperly groups together what are in fact multiple, separate entities (e.g., "Hitachi").

INTRODUCTION

The Court should preclude Plaintiffs and their witnesses from making the following improper characterizations of or references to Defendants and their alleged co-conspirators:

First, Plaintiffs should be prohibited from using inflammatory rhetoric to refer to Defendants and/or their alleged co-conspirators, including, but not limited to referring to them as "convicted criminals," "felons," "admitted price-fixers," or "cartelists." Such inflammatory rhetoric serves no legitimate purpose; is inaccurate; is barred as unfairly prejudicial and misleading under Rule 403; and is improper character evidence under Rule 404.

Second, Plaintiffs should be prohibited from appealing to negative stereotypes of Asian companies and Asian business culture because such generalizations are irrelevant, and whatever slight probative value they may have is substantially outweighed by the danger of unfair prejudice.

Third, Plaintiffs should be compelled to refer to Defendants and alleged co-conspirators by their specific corporate entity names (e.g., "Hitachi America" and "Hitachi Asia"), rather than by generic references to corporate entities which are legally nonexistent and improperly groups together what are in fact multiple, separate entities (e.g., "Hitachi"). Failure to do so would effectively eliminate Plaintiffs' burden to prove liability as to *each* Defendant and would only confuse and mislead the jury.

ARGUMENT

I. The Court Should Prohibit Plaintiffs' Use of Inflammatory Rhetoric At Trial

The Court should prohibit Plaintiffs' and their witnesses' use of inflammatory rhetoric at trial, including, but not limited to references to any of the Defendants and/or their alleged co-conspirators as "convicted criminals," "felons," "admitted price-fixers," or "cartelists" which serves no legitimate purpose but is intended solely to inflame the jury and unfairly prejudice Defendants. Fed. R. Evid. 402, 403, and 404.

First, inflammatory rhetoric has no place in any trial. And, its use would be particularly inappropriate and confusing here given that only one defendant has entered into a plea agreement, and only with respect to CDTs (one type of CRT).[1]

[1] To the extent Plaintiffs refer to convictions involving products other than CRTs, such convictions

Second, particularly because inflammatory rhetoric has no probative value, real dangers of unfair prejudice, confusion, and misleading the jury tip the balance sharply in favor of its exclusion. Fed. R. Evid. 403. Inflammatory rhetoric is the classic example of "suggest[ing] decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.*, 1972 Advisory Committee Note. Inappropriate epithets such as "convicted criminal" or "convicted felon" are by their nature inflammatory, and their only purpose is to smear Defendants and prejudge their civil liability on grounds other than the merits of the case. *See, e.g., U.S. v. Basham*, 561 F.3d 302, 327 (4th Cir. 2009) (unfair prejudice occurs when evidence lures "the factfinder into declaring guilt on a ground different from proof specific to the offense charged"); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1150 (9th Cir. 2001) (although racial discrimination was relevant to the case, "racially inflammatory comments" were improper, and "went well beyond the limits of legitimate advocacy").

Third, any suggestion that Defendants and/or their alleged co-conspirators are "convicted criminals" is improper evidence of purported wrong acts which is inadmissible to prove that on this particular occasion, Defendants and/or their alleged co-conspirators acted in accordance with that character. Fed. R. Evid. 404.

Indeed, Judge Illston in the *LCD* trial in this district granted the very same *in limine* motion to exclude inflammatory rhetoric. Ex. 1 (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL Dkt. No. 5010 (N.D. Cal. Mar. 3, 3012) (Defendant LG Display's Motion *In Limine* No. 3 to Exclude Evidence and Arguments Specified Herein)), at 2; and Ex. 2 (MDL Dkt. No. 5597 (N.D. Cal. May 4, 2012) (Final Pretrial Scheduling Order), at 7 (granting LG's motion to exclude inflammatory rhetoric)).[2]

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are irrelevant and inadmissible here. (*See* Defendants' Joint Motion *In Limine* Excluding Evidence or Argument Regarding Non-CRT Product Conspiracies, Defendants' MIL No. 4.)

[2] All exhibits referenced herein refer to the Declaration of James L. McGinnis In Support of Defendants' MIL No. 6, submitted concurrently herewith ("McGinnis Decl.").

II. The Court Should Exclude Evidence And Argument Relating To Stereotyping Of Asian Firms and Asian Business Culture

The Court should exclude evidence or argument appealing to negative stereotyping of Asian companies and Asian business culture under Federal Rules of Evidence 402 and 403: such generalizations are irrelevant, and whatever slight probative value it may have is substantially outweighed by the danger of unfair prejudice.

Plaintiffs intend to inject into this trial negative, unfounded generalizations about Asian companies and Asian business culture so as to underscore for the jury the notion that they are fundamentally inferior and inherently dishonest as compared to U.S. firms. Plaintiffs' expert, Stephan Haggard, has made such generalizations at great length, and Plaintiffs plan to elicit the same testimony at trial,[3] including, for example:

- [redacted]
- [redacted]
- [redacted]

[3] Plaintiffs' claim that Dr. Haggard may testify before the jury to help establish Plaintiffs' standing for indirect purchases from Samsung Electronics Co., Ltd. contradicts binding precedent in the Ninth Circuit. The Ninth Circuit has expressly held in *In re ATM Fee Antitrust Litigation*, 686 F.3d 741 (9th Cir. 2012), that "[b]ecause the court (and not a jury) decides standing, the district court must decide issues of fact necessary to make the standing determination." *Id.* at 747. *See also Costco Wholesale Corp. v. AU Optronics*, 2014 WL 4674390, at *4 n.3 (W.D. Wash. Sept. 18, 2014) (relying on *In re ATM* to conclude that issues relating to ownership or control are not jury issues, but instead will be determined by the court). While the danger of unfair prejudice and confusion of the issues are greatly heightened if generalizations about Asian business culture are presented before the jury, such generalizations likewise have no place in the court's determination of whether Plaintiffs can satisfy the ownership-or-control exception to *Illinois Brick*.

[4] According to Dr. Haggard, *chaebols* are a subcategory of "Asian business groups" unique to South Korea. Ex. 3 (Apr. 15, 2014 Expert Report of Stephan Haggard ("Haggard Rpt.")) at ¶¶ 7, 28.

[5] *Id.* at ¶ 16.

[6] *Id.* at ¶ 16.

[7] *Id.* at ¶ 34.

- [redacted]

These, and any other negative generalizations about Asian firms or Asian business culture are inappropriate and must be excluded.

A. Courts Routinely Exclude Negative Stereotyping About Ethnic Or National Practices

Courts routinely exclude purported "expert" testimony and other evidence based on stereotypes or generalizations about ethnic or national business practices. *See, e.g., Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1001-10 (9th Cir. 2001), amended by 272 F.3d 1289 (9th Cir. 2001) (generalizations regarding Korean businesses inadmissible); *In re Heparin Prod. Liab. Litig.*, 2011 WL 1059660, **9-11 (N.D. Ohio Mar. 21, 2011) (generalizations regarding Chinese businesses inadmissible); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2004 WL 1899927, **26-28 (N.D. Ill. Aug. 23, 2004) (generalizations regarding Japanese businesses inadmissible).

B. Whatever Little Probative Value Negative Stereotyping May Have Is Substantially Outweighed By The Danger Of Unfair Prejudice

In *Jinro*, defendants relied on an "expert" to testify about the business practices or "modus operandi" of Korean companies (this case also involved a Korean *chaebol*), particularly "their alleged propensity to engage in fraudulent activity, including the avoidance of Korean currency laws" as defendants alleged in the case. 266 F.3d at 1001. In finding that the lower court erred in admitting such "expert" testimony, the Ninth Circuit held that such testimony "tinged with ethnic bias and stereotyping" should have been excluded under Rule 403's balancing test:

> Allowing an expert witness in a civil action to generalize that most Korean businesses are corrupt, are not to be trusted and will engage in complicated business transactions to evade Korean currency law is tantamount to ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype.

[8] *Id.* at ¶ 36-7.

Id. at 1007; *see also id.* at 1007-08 (discussing and collecting other cases prohibiting inappropriate injection of race or ethnicity into trial). The Ninth Circuit concluded: "the risk of racial or ethnic stereotyping is substantial, appealing to bias, guilt by association and even xenophobia." Because the "expert's" testimony invited the jury to distrust Jinro because it was a Korean company, it invoked ethnic, national stereotyping which is barred under Rule 403. *Id.* at 1008; *id.* at 1010 (improper to invite the jury to put the plaintiff's cultural background into the balance."). *See also In re Heparin*, 2011 WL 1059660 at **9-10 (whatever slight probative value an expert's generalizations regarding Chinese manufacturing practices, including the risk of sourcing materials in China and the prevalence of counterfeiting and other manufacturing "games and tactics," might have is substantially outweighed by the "serious risk of prejudicing the jury"); *Sunstar*, 2004 WL 1899927 at *27 ("Testimony that 'either directly or indirectly seeks to link a defendant's conduct to that which is said to be typical of a particular racial, ethnic group or nationality' is excludable under Rule 403's balancing test.").

Consistent with *Jinro* and other cases, Plaintiffs must be precluded from presenting negative, unfounded generalizations about Asian business groups, including, but not limited to the stereotype that [redacted][9] This kind of stereotyping not only has zero probative value to any issue in this case, but injects the Defendants' nationality and ethnicity into the proceedings in an indisputably negative way.

C. Negative Stereotypes About Asian Businesses Are Irrelevant

In addition to failing Rule 403's balancing test, negative generalizations about how Asian firms may behave generally simply are not relevant to any of the specific issues in this case: "It is a factual question whether a majority of Korean businessmen act in a certain way, but whether that fact is proven or not, it has no relevancy to show that this particular Korean businessman (or company) is that type of a businessman or acted that way in this specific contractual arrangement." *Jinro*, 266 F.3d at 1011 (Wallace, J., concurring). *See also Sunstar*, 2004 WL 1899927 at *27

[9] Ex. 3 (Apr. 15, 2014 Expert Report of Stephan Haggard), at ¶¶ 16, 34, 36-37.

(generalizations regarding the Japanese attitude towards contracts, including preference by Japanese businesses to deliberately include vague contract provisions allowing for flexible implementation of contracts do not make it more probable that the parties in this case acted in that way with respect to this particular contract).

III. The Court Should Compel Plaintiffs To Refer To Defendants And Their Alleged Co-Conspirators By Their Specific, Individual Corporate Entity Names

The Court should compel Plaintiffs and their witnesses to refer to Defendants and their alleged co-conspirators by their specific, legal corporate entity names, e.g., "Hitachi America," "Philips Electronics North America," "MTPD" and "Panasonic Corporation," and preclude generic references to purported corporate entities that do not legally exist, which improperly groups together multiple, separate entities, e.g., "Hitachi," "Philips," or "Panasonic."[10]

First, such generic references disregard each Defendant's separate corporate existence, and as a result, effectively eliminate Plaintiffs' burden to prove liability as to *each* Defendant. There are well-established principles that determine when the distinct corporate form will be ignored, and the standards are high. Plaintiffs should not be allowed to avoid having to meet those high standards through what amounts to smoke and mirrors.

Second, allowing Plaintiffs to use generic names will only confuse and mislead the jury. *See* Fed. R. Evid. 403. This is already an extremely complex case that will present challenges for any jury. That complexity will only be compounded if for weeks—possibly, months—the jury hears Plaintiffs continually using only "Philips" or "Hitachi" and is then instructed to make individualized findings as to each Defendant on a verdict sheet that nowhere identifies just "Philips" or "Hitachi." Plaintiffs' apparent goal is not difficult to discern: they hope the jury will impute the bad acts of one corporate actor to other corporate actors within the same group,

[10] Defendants are not suggesting that Plaintiffs must spell out in detail the exact corporate name of each Defendant or their alleged co-conspirators every time Plaintiffs wish to refer to that Defendant or alleged co-conspirator. Defendants only ask the Court to ensure that the jury understands which specific Defendant or alleged co-conspirator entity Plaintiffs are referring to at all times. For the sake of efficiency, Defendants propose reaching an agreement with Plaintiffs regarding how to appropriately refer to the various Defendants and their alleged co-conspirators efficiently without risking prejudice or confusion.

regardless of the law and actual facts. The risk of that extreme prejudice plainly outweighs whatever "convenience" argument Plaintiffs may offer.

A. Allowing Plaintiffs To Use Generic Names Would Undermine The Doctrine Of Corporate Separateness And Distort The Burden Of Proof

Because Defendants are separately incorporated, their independence must be presumed. *E. & J. Gallo Winery v. EnCana Energy Servs., Inc.*, Civ. No. 03-5412 AWI LJO, 2008 WL 2220396, at *5 (E.D. Cal. May 27, 2008).[11] And that presumption of independence means that "Plaintiffs will need to provide evidence of *each Defendant's* participation in the conspiracy." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008) (emphasis added). In other words, each Defendant has a right to demand that Plaintiffs support their claim against that Defendant with individualized proof. The use of generic names, however, would effectively eliminate Plaintiffs' burden as to each Defendant and instead allow them to implicitly argue "guilt by name association," which would be particularly troubling where there may be no evidence whatsoever of a particular entity's knowledge or participation.

The risk that the jury will apply a "guilt by name association" standard is particularly high in this case because Defendants and their alleged co-conspirators, even within a corporate group, are not similarly situated. Plaintiffs individually sued numerous entities from the same corporate group. But these entities within a given corporate family are not interchangeable pieces, performing the exact same role. These entities are separately incorporated, are managed and operated in different regions and countries throughout the world, and are serving different roles within the corporate group. For example, some manufactured and produced just CRTs, some manufactured and produced both CRTs and finished products containing CRTs ("CRT Finished Products") while others manufactured and produced solely CRT Finished Products, and some only

[11] *See also Indus. v. St. Regis Paper Co.*, 420 F.2d 449, 453 (9th Cir. 1969) ("The separate identities of a parent and its subsidiary, even a wholly owned subsidiary, will not be disregarded unless a recognition of their separateness, under the circumstances, would sanction a fraud or promote injustice."); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234 (N.D. Cal. 2004) ("The law allows corporations to organize for the purpose of isolating liability of related corporate entities.").

sold CRTs and/or CRT Finished Products but did not manufacture them. To make matters more complicated, some entities fall into certain categories for only part of the relevant time period, for example, where newly-created joint venture companies were formed. Defining which Defendants and which alleged co-conspirators were doing what, and when, will be a hotly contested issue at trial, especially given that many Defendants will argue that they and/or their alleged co-conspirators withdrew from the alleged conspiracy or never participated at all. Plaintiffs should not be permitted to obscure all of these potentially-dispositive issues in an attempt to eliminate its burden as to each Defendant.

Of course, this issue has nothing to do with whether Plaintiffs can attempt to hold Defendants within a corporate family vicariously liable for the conduct of each other. They can still do so unimpeded. If Plaintiffs intend to argue that one Defendant or alleged co-conspirator is the alter ego or agent of another, there are clearly established standards that they must satisfy and those standards exist for a reason—it is not meant to be easy for Plaintiffs to disregard the corporate form.[12] What matters here is that if Plaintiffs intend to argue that one corporate entity is vicariously liable for the actions of a separate corporate entity, then they must be transparent about it and not seek to obscure the very issue that they are attempting to prove. The only way to ensure that Plaintiffs do not end run the alter ego and agency tests is to require them to identify for the jury which specific Defendant or alleged co-conspirator entity they are talking about. That can only happen if Plaintiffs are prevented from using generic names to refer to several Defendants and/or alleged co-conspirators at one time.

B. Allowing Plaintiffs to Use Generic Names Will Confuse and Mislead the Jury

Federal Rule of Evidence 403 prohibits the introduction of evidence that will confuse or

[12] *Shinde v. Nithyananda Found.*, No. EDCV 13-0363 JGB SPX, 2013 WL 1953707, at *14 (C.D. Cal. May 10, 2013) ("it is the plaintiff's burden to overcome the presumption of the separate existence of the corporate entity"); *Lisa McConnell, Inc. v. Idearc, Inc.*, No. 09-CV-00061-IEG(AJB), 2010 WL 364172, at *8 (S.D. Cal. Jan. 22, 2010) ("The alter ego test is demanding."); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001) ("Such a burden is notoriously difficult for plaintiffs to meet . . . in order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such.").

mislead the jury as well as unduly prejudicial evidence. While this Motion is not specifically targeted at the introduction of evidence, it goes directly to how Plaintiffs and their witnesses discuss and characterize the evidence that is introduced. Defendants seek to prevent Plaintiffs from discussing the facts of this case in a way that is intended to, and will, confuse and mislead the jury as to the significance of that evidence. If that confusion is not avoided, it will unduly prejudice Defendants. *See United States v. Coward*, 630 F.2d 229, 231 (4th Cir. 1980) (reversing and remanding for separate trials because the trial "was often confusing for both attorneys and the jury" and the jury expressed confusion as to what evidence related to each defendant).

This trial will culminate in the jury being asked to make specific findings as to each Defendant. More specifically, the jury will have to assess whether Plaintiffs have met their burden of proof as to each Defendant. Given the complexity of this case, the Court should not countenance attempts to further complicate the jury's job by forcing them to unscramble imprecise references to the very Defendants that the jury will be asked to render verdict upon.

For the foregoing reasons, the Court should require Plaintiffs to make clear to the jury which Defendant and/or alleged co-conspirators they are referring to and prohibit Plaintiffs from using generic names that do not refer to an actual Defendant and/or alleged-conspirator, or even an actual legal entity.

CONCLUSION

For these reasons, the Court should grant this motion and exclude improper characterizations of or references to Defendants and/or their alleged co-conspirators relating to inflammatory rhetoric, and stereotyping of Asian firms and Asian business culture. The Court should also compel Plaintiffs to refer to Defendants and their alleged co-conspirators by their specific corporate entity names.

Dated: February 13, 2015

Respectfully submitted,

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